Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-477

NOVEMBER TERM, 2003

State of Vermont v. James Burke	}	APPEALED FROM: District Court of Vermont, Unit No. 2, Chittenden Circuit DOCKET NO. 5040-8-01 CnCr Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Pursuant to a conditional plea agreement, defendant appeals the district court' s denial of his motion to dismiss the State' s charge of possession of stolen property. We affirm.

In August 2001, an informant called police to tell them that defendant had stolen two power roofing seamers from his former employer. After confirming that the employer was missing two roofing seamers, the police set up a sting operation in which the informant and another person posing as a buyer met with defendant to purchase the seamers. Following the operation, the police arrested defendant and impounded the truck containing the seamers. That night, before the police were able to obtain and execute a warrant to search the truck, someone apparently broke into the police impound yard and removed the seamers from the truck.

The State charged defendant with possession of stolen property, in violation of 13 V.S.A. § 2561(b). The State also charged defendant with unlawful trespass, in violation of 13 V.S.A. § 3705(d), based on his attempt to avoid arrest by entering the basement of a nearby residence. Defendant filed several motions to dismiss the possession-of-stolen-property charge, arguing that the State could not produce sufficient evidence to establish the elements of the charge. The district court denied the motions, and defendant entered into a plea agreement under which the State withdrew the unlawful-trespass charge, and defendant pled no contest to the possession-of-stolen-property charge, conditioned upon his right to appeal the court' s denial of his motion to dismiss. On appeal, defendant argues that the district court erred by denying his motion to dismiss under V.R.Cr.P. 12(d) because the State, which neither positively identified nor ever possessed the alleged stolen property, failed to present evidence reasonably tending to prove that he possessed stolen property.

To overcome defendant' s motion to dismiss under V.R.Cr.P. 12(d), the State had to produce " admissible evidence on each element of the crime charged." State v. Turnbaugh, 811 A.2d 662, 665 (Vt. 2002) (mem.). In reviewing the denial of defendant' s motion, we must determine, as did the district court, " ' whether, taking the evidence in the light most favorable to the state and excluding modifying evidence, the state has [produced] evidence fairly and reasonably tending to show the defendant guilty beyond a reasonable doubt.' " State v. Fanger, 164 Vt. 48, 51 (1995) (quoting Reporter' s Notes, V.R.Cr.P. 29).

The offense of possession of stolen property includes the following elements: " (1) receiving, (2) property which is stolen, (3) with knowledge that the property was stolen." State v. Olds, 141 Vt. 21, 24-25 (1982). Here, defendant contends that because the State was unable to recover the alleged stolen property from the impounded truck, and further was unable to present any evidence identifying the machines in the truck as those missing from his former employer, the

State' s evidence was insufficient to meet its burden of demonstrating that defendant possessed stolen property.

We conclude that the State produced substantial admissible evidence, when viewed most favorably from the perspective of the State and excluding modifying evidence, reasonably tending to demonstrate beyond a reasonable doubt that defendant was in possession of property he knew to be stolen. At the motions hearing, the State presented the testimony of several witnesses, including the informant. A police officer testified that he had contacted the informant after receiving a call from a police officer in another town, and that the informant had told him that defendant was attempting to sell two stolen roofing seamers. The general manager of the business where defendant had been employed testified that, after being contacted by police, he confirmed that the business was missing two roofing seamers, a silver one and a red one. He also stated that it appeared someone had tampered with the lock on the trailer containing the seamers.

Other witnesses testified as to what occurred during the sting operation. The informant testified that he met with defendant, who took him to a truck, where he saw two covered boxes. Informant pulled the cover back to reveal one of the open boxes, which contained a silver machine with rollers. The person posing as a buyer confirmed this sequence of events, stating that while he was not in the roofing business, he believed that the silver machine he observed was a roofing seamer. A police officer testified that defendant fled the scene and was arrested shortly thereafter after he was found hiding in the basement of a nearby residence. The State also submitted an affidavit of the informant stating the following: (1) upon learning that the owner of a roofing business was willing to pay $1000 with no questions asked to recover a stolen roofing seamer, defendant told the informant that he could get a couple of the machines; (2) a couple of days later, defendant told the informant that he would be able to get some seamers from his former employer' s place; (3) later, defendant called informant again, asking the informant to find a buyer because he had gotten the seamers by picking a lock at his former employer' s business; and (4) the informant called police, who set up the sting operation.

Taken together, this evidence, though mostly circumstantial in nature, was more than sufficient to survive defendant' s motion to dismiss for lack of a prima facie case. Cf. State v. White, 172 Vt. 493, 498 (2001) (in reviewing motion for judgment of acquittal, court must consider evidence together, not separately; thus, even if each piece of circumstantial evidence may be explained away, acquittal does not necessarily follow). " [T]here is nothing talismanic about physical evidence. In a prosecution for receiving stolen goods, it is not necessary that any of the goods allegedly received be introduced into evidence if they are otherwise identified." State v. Creamer, 359 A.2d 603, 606 (Me. 1976) (citing cases from other jurisdictions). While the witnesses' descriptions identifying the seamers were limited, the sum of the evidence considered together amounts to far more than mere speculation that defendant was in possession of stolen property. Cf. Martin v. State, 461 So. 2d 1340, 1342 (Ala. Crim. App. 1984) (while crime of receiving stolen property may be proven by circumstantial evidence, witness' s " guess" that allegedly stolen automobile part came from certain truck was not enough to establish defendant' s possession of stolen property). We find unavailing defendant' s reliance on cases holding that possession of stolen property cannot be proved merely by showing that the defendant was in possession of an automobile that was the same make, model, color, and year of an automobile stolen in another place. See United States v. Sroka, 621 F.2d 1012, 1015 (1st Cir. 1980); Watkins v. United States, 409 F.2d 1382, 1386 (5th Cir. 1969). The same logic does not necessarily apply to relatively uncommon property like roofing seamers, but even if it did, the State presented far more evidence connecting the seamers seen in the truck to those stolen from defendant' s former employer.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Denise R. Johnson, Associate Justice

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Paul L. Reiber, Associate Justice